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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 TODD KREISLER,

4 Plaintiff,

5 v.

10 Civ. 7592 (RJS)

6 SECOND AVENUE DINER CORP
7 and J.J.N.K. CORP.,

8 Defendants.

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9
10 July 25, 2011
2:15 p.m.

11 Before:

12 HON. RICHARD J. SULLIVAN

13 District Judge

14 APPEARANCES

15 ADAM SHORE
16 Attorney for Plaintiff

17 PAUL STAMATELATOS
Attorney for Defendants

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1 (Case called)

2 (In open court)

3 MR. SHORE: Adam Shore for the plaintiff.

4 THE COURT: And for the defendant?

5 MR. STAMATELATOS: Paul Stamatelatos.

6 THE COURT: All right. We're here because of the
7 premotion letter from Mr. Stamatelatos concerning really a
8 standing challenge with respect to the plaintiff here.

9 I've got the response of Mr. Shore, and I have looked
10 at the cases. Mr. Stamatelatos, you rely quite a bit on a
11 Tenth Circuit case, but I think the Second Circuit is clear
12 that they're either critical of or certainly distinguishing
13 toward that case. The Second Circuit standard I think is quite
14 different. Do you agree with that?

15 MR. STAMATELATOS: Yes, I have been researching that,
16 your Honor.

17 THE COURT: Yes. I mean, look, there is a certain
18 intuitive appeal to the argument you are making here, and it
19 might be a closer case in the case that Mr. Hirsch, who has
20 about 80 of these things kicking around, but even in that case
21 I'm just not sure that Congress didn't frankly intend for
22 people to be acting as their own little private Attorneys
23 General and figuring out what establishments are in compliance
24 and what ones are not in compliance with the Americans with
25 Disabilities Act. So, I think it's not likely to be a winner

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1 here.

2 I don't think the plaintiff has to establish that he
3 desperately wants to eat at a particular place and has tried to
4 get over the step to do it in order to have standing. I think
5 some of the internal problems I think are a closer question,
6 because if he has never been inside the restaurant before, the
7 additional burdens are ones that it seems like those are just
8 kind of tag-along causes of action or tag-along arguments.

9 But it seems to me this is not likely a winner, and as
10 you know I haven't decided, and I don't ever tell anyone they
11 can't make a motion, but I do think it's worth discussing with
12 the parties what my sense of the merits of a motion are before
13 they spend a lot of time, and energy and money making the
14 motion.

15 So, it does seem to me that it's not likely to be a
16 winner. I think that, you know, injure in fact doesn't require
17 that much, certainly doesn't require what the Tenth Circuit has
18 said it requires. But I am happy to hear you,
19 Mr. Stamatelatos.

20 MR. STAMATELATOS: The issue here, your Honor, is out
21 of the plaintiff's deposition came testimony that he never saw
22 the complaint. The first time he saw the complaint was during
23 the deposition. He never entered the store. He was not aware
24 of any of the architectural barriers. So, I think firstly
25 that's going to be a problem for the plaintiff with standing.

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1 THE COURT: But I mean never mind the interior
2 barriers. There is a barrier to getting in, right?

3 MR. STAMATELATOS: But the defendants had a portable
4 ramp, your Honor. He never approached the diner at any time
5 saying, yes, I want to come into the store but I cannot. That
6 was in his testimony. He never spoke to anybody at the diner
7 trying to get access into the diner. So, it's not a given
8 that, yes, because there is a step he cannot gain access.

9 My clients have had people in the diner with
10 wheelchairs, so it is possible for somebody to enter the store
11 with a wheelchair. You put the portable ramp. They cannot
12 install a permanent ramp there. I think the distance between
13 the step and not the sidewalk but the curb, I think there are
14 some phone booths, there is maybe four feet, so it's not
15 possible for them to install a permanent ramp. But they do
16 have a portable ramp that is used when handicapped people need
17 access to the diner.

18 So, it's not that he couldn't get into the store. He
19 never tried to get into the store. He never spoke to anybody
20 at the diner to gain access into the store.

21 THE COURT: But I don't think you have to have tried
22 to get into the store to have standing. The cases don't seem
23 to say that. I think they are saying there is authority for
24 the proposition that you have to have knowledge of the
25 barriers, and I think a person who is standing outside or

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1 sitting outside of the establishment can look at the step that
2 is a barrier to entrance and can conclude from that that there
3 is a barrier that's not in compliance with the ADA. So, I
4 don't think standing is ultimately going to be the winner here.

5 Now, you may be able to establish that what they've
6 got, the temporary ramp, is sufficient or that the changes
7 being proposed of a permanent nature are not feasible. And
8 then I think that you have some pretty good arguments about
9 whether or not there was any actual knowledge of the barriers
10 that were inside the restaurant, which is the height of the
11 cashier area, the table there, the signage, the restroom
12 facilities and the emergency exit. I think it seems to me that
13 the record is -- at least it's been represented to me that the
14 record is clear that the plaintiff didn't know any of those
15 things at the time the suit was brought. But it does seem
16 certainly that he was aware of the step that would have
17 prohibited him from getting into the restaurant absent a ramp,
18 right? Do you agree with that?

19 MR. STAMATELATOS: There is a step, yes, there is.
20 There is access for him. If he requires access, there is a
21 portable ramp that the diner can place for handicapped people
22 to gain access.

23 THE COURT: So, you are suggesting that in order to
24 have standing he's basically got to try to get in and see if
25 they have a ramp or see if they make accommodations to get him

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1 in?

2 MR. STAMATELATOS: Sure.

3 THE COURT: And if he doesn't do that, he doesn't have
4 standing?

5 MR. STAMATELATOS: That's what I feel.

6 THE COURT: Well, I mean you can feel it, but I don't
7 see any authority that supports that. So, I mean is there any
8 authority that you are citing besides this Tenth Circuit case?

9 MR. STAMATELATOS: I haven't found anything in the
10 Second Circuit yet, your Honor.

11 THE COURT: OK. So, I think it's not likely to be a
12 winner on standing. That's my sense.

13 All right. Mr. Shore, what is one to make of this? I
14 mean general matter I mean there are a number of plaintiffs who
15 are bringing dozens of cases including Mr. Hirsch, and there is
16 a law firm that represents Mr. Hirsch in all of these cases,
17 including some restaurants where Mr. Hirsch would have
18 difficulty based on dietary restrictions from eating a meal
19 there, and so the whole thing looks to a cynical observer as
20 just sort of a game. Is that's what's going on?

21 MR. SHORE: Your Honor, I'm not involved in Mr.
22 Hirsch's cases, I have never been involved in Mr. Hirsch's
23 cases. I don't know who he is.

24 THE COURT: He's represented by the Weitz law firm.
25 So, what's the relationship between your firm or you and the

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1 Weitz law firm in this case?

2 MR. SHORE: I am lead case. The Weitz law firm just
3 happens to be cocounsel. The plaintiff mainly always basically
4 deals with me. Mr. Todd Kreisler deals with me. The Weitz Law
5 Firm, P.A. handles the Hirsch cases. I have no involvement in
6 these Hirsch cases, and I don't have any knowledge, and I don't
7 have any comment on those cases because, one, they haven't been
8 decided yet, and, two, it's just a New York Post article.

9 I really don't know what to say other than those cases
10 remain to be resolved, and it's for a court to decide, and I
11 have no other comment with regard to the Hirsch matters because
12 I'm not involved with them.

13 With regards to this case the plaintiff lives within
14 three blocks from the Plaza Diner. He wants to eat in the
15 diner. He testified that he has wanted to eat there on
16 numerous occasions and would have gone in if it was accessible.

17 Prior to the commencement of this action there was
18 never a buzzer at the entrance of the diner. Subsequent to the
19 filing of this action, defendant admitted that they installed a
20 buzzer for the plaintiff and others who are similarly situated
21 to press the buzzer to alert staff to place the portable ramp
22 at the entrance of the facility. Plaintiff is not
23 acknowledging whether the portable ramp is or is not in
24 compliance with the ADA.

25 THE COURT: Well, that seems to be one of the issues,

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1 whether the portable ramp or the temporary ramp is compliant,
2 whether that's enough to solve the problem. Another issue is
3 if it's not, what is the plausible proposal for a permanent
4 removal of the barrier. And Mr. Stamatelatos seems to be
5 suggesting that it's not even possible to put in a ramp because
6 it's too close to the sidewalk or the street, whatever it is.
7 So, that's another issue. And then the costs and other factors
8 associated with whether it's readily achievable will have to be
9 things that are resolved either from a jury or before me or as
10 part of a summary judgment motion. But, Mr. Stamatelatos, you
11 are not really talking about summary judgment on anything other
12 than standing, right?

13 MR. STAMATELATOS: Readily achievable as well, your
14 Honor.

15 THE COURT: OK.

16 MR. STAMATELATOS: Basically the plaintiff's expert
17 report, your Honor, doesn't have any specifics, doesn't have
18 the costs involved which would rectify any of the barriers.
19 So, I feel that the defendant does have a chance even on the
20 readily achievable standard on a summary judgment motion.

21 THE COURT: You are basically saying that the
22 plaintiffs have not met their burden of establishing readily
23 achievable corrections of the barrier, right, because their
24 expert report doesn't explain what could be done, what it would
25 cost, what it would entail.

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1 MR. STAMATELATOS: That's correct, your Honor.

2 THE COURT: All right. And standing you cite a Judge
3 Duffy case in decent in the Ninth Circuit, but that doesn't get
4 us too far. And then you have a Tenth Circuit case that you
5 also referenced, which I think has been clearly distinguished,
6 and frankly it's criticized by the Second Circuit.

7 So, I think the standing issue is a long shot. I
8 think the issue as to readily achievable is something that's
9 generally going to be left to a fact finder, and the only way
10 it would be appropriate for summary judgment is if there is no
11 way that a reasonable fact finder, a reasonable jury, could
12 conclude in the plaintiff's favor. I don't know enough about
13 the state of the record at this point, but that would be
14 unusual certainly.

15 All right. When do you want to make your motion? Or
16 is there any point? I mean, look, I think there is going to be
17 a trial here; I think this is where this is headed. It might
18 be a lot easier to just get there and make your arguments which
19 might be very good defenses frankly. I mean I thought this
20 case was very close to settling and then for whatever reason it
21 got pulled back primarily because of the public nature of a
22 settlement, right?

23 MR. STAMATELATOS: That's correct, your Honor.

24 THE COURT: So, I never quite understood that one.
25 But in any event it seems to me that I certainly don't tell you

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1 you can't make a motion, but I'm not sure that we should
2 schedule the motion and then only after that do I set a trial
3 date. I think we ought to just put this down for a trial, and
4 I will resolve the motion before trial, but I think it's not
5 likely to resolve the whole case.

6 So, Mr. Shore, anything you want to say?

7 MR. SHORE: No, your Honor.

8 THE COURT: I mean are you prepared to try this case?

9 MR. SHORE: Yes.

10 THE COURT: And I mean what is your response to what
11 Mr. Stamatelatos has to say about the fact that your expert
12 hasn't really provided too much in the way of details?

13 MR. SHORE: Well, your Honor, plaintiff's expert has
14 provided --

15 THE COURT: But he hasn't even visited the location,
16 right?

17 MR. SHORE: The plaintiff's expert visited the
18 location on June 15, conducted an inspection and then provided
19 an expert report approximately two weeks later. The expert
20 report does contain certain procedures or things that the
21 defendants can do to make the facility accessible in accordance
22 with the ADA. There is a remediation plan.

23 THE COURT: So, what does he propose? I haven't seen
24 the report. What is he saying?

25 MR. SHORE: The plaintiff's expert report states that

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1 there should be a permanent ramp as well as accessible
2 restroom. Currently there is no accessible restroom. Although
3 plaintiff's expert report doesn't include costs or specific
4 estimates in its expert report, I don't think that's necessary
5 given the case law.

6 And, in addition, the defendant's expert report does
7 contain cost estimates for modifying the restroom to make it
8 accessible. The defendant's expert stated it would cost
9 approximately \$13,000 to make the restroom accessible, which
10 certainly given the defendant's tax returns they have the money
11 to do it, and it should be done.

12 In addition, plaintiff's expert --

13 THE COURT: How is a jury to determine whether
14 something is readily achievable if they don't have any idea how
15 much it's going to cost? Cost isn't a relevant factor?

16 MR. SHORE: The defendant's expert report states that
17 to make the bathroom fully accessible would cost 13,000.

18 THE COURT: No, I am talking about the ramp. Your
19 expert doesn't articulate or explain how much it's going to
20 cost.

21 MR. SHORE: Correct.

22 THE COURT: You concede that, right?

23 MR. SHORE: Yes.

24 THE COURT: So, I mean how is a jury going to conclude
25 that it's readily achievable, that this remediation that you

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1 propose is readily achievable, when they are not going to know
2 how much it costs?

3 MR. SHORE: Well, the ramp would only have to be a
4 small ram. The cost obviously would not be a lot of money.

5 THE COURT: Well, how do I know that it wouldn't be a
6 lot of money? I mean how is a jury going to know it wouldn't
7 be a lot of money? How are they going to be able to assess
8 what you think is not a lot of money is in fact a lot of money?

9 MR. SHORE: Through the expert testimony when the
10 experts testify.

11 THE COURT: But it's not going to be in the expert
12 report. So, if it's not in the expert report, I'm nevertheless
13 going to let your expert get on the stand and start opining
14 about things that he didn't include in his expert report?

15 MR. SHORE: Well, if during the bench trial the court
16 were to conclude that the permanent ramp couldn't be placed in
17 because there is no cost estimate, under the readily achievable
18 standard there is a portable ramp. The plaintiff can get
19 into -- may possibly be able to enter the facility through the
20 portable ramp and the buzzer that has been installed. And
21 since there is cost estimates in the defendant's expert report
22 regarding the restroom, then your Honor could decide that the
23 restroom could be made accessible to provide access to my
24 client.

25 THE COURT: All right. This is a bench trial?

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1 MR. SHORE: Yes, it's a bench trial.

2 THE COURT: But I mean how am I going to -- on the
3 cause of action relating to the ramp getting into the
4 restaurant, you are arguing that a permanent ramp is readily
5 achievable, but you haven't introduced or you are not prepared
6 to introduce evidence as to how much that is going to cost,
7 correct?

8 MR. SHORE: Unless the plaintiff is able to amend the
9 expert report, no, there is no cost estimates regarding the
10 permanent ramp.

11 THE COURT: Well, why not? I mean why was that not a
12 foreseeable and obvious question for fact finder?

13 MR. SHORE: I requested the expert to put cost
14 estimates in the report, however, on such short notice he
15 didn't respond, he didn't put the cost estimates.

16 THE COURT: But why short notice? I mean this seems
17 to have been a very simple case with very simple key issues,
18 and yet that has eluded everyone.

19 MR. SHORE: Plaintiff isn't conceding that it's his
20 burden to establish that it's readily achievable or that it's
21 even necessary for plaintiff to include in its expert report
22 specific cost estimates.

23 THE COURT: Wait. You don't think that it's your
24 burden to articulate a plausible proposal for barrier removal?

25 MR. SHORE: I think it is.

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1 THE COURT: The costs of which facially do not exceed
2 its benefits?

3 MR. SHORE: I just don't know if it's necessary for
4 there to be exact cost estimates in the expert report.

5 THE COURT: Well, the case law is clear -- and this is
6 the Second Circuit -- that neither the estimates nor the
7 proposal are required to be exact or detailed, but I mean here
8 we don't even have a cost proposal at all. Right?

9 MR. SHORE: There is no cost proposal in plaintiff's
10 expert report regarding the permanent ramp.

11 THE COURT: So, I mean, look, I don't know, but it
12 seems to me that it's a pretty big oversight.

13 Well, let's first find out when Mr. Stamatelatos wants
14 to make the motion.

15 MR. STAMATELATOS: I could make a motion probably in
16 about three weeks, your Honor.

17 THE COURT: All right. And then how long to respond,
18 Mr. Shore?

19 MR. SHORE: Seven to ten days.

20 THE COURT: OK. Then reply, I give you a week?

21 MR. STAMATELATOS: That's fine.

22 THE COURT: I am just wondering if it makes sense to
23 schedule this for a trial at the same time.

24 And is there any benefit at taking another crack at
25 settlement since this thing was so close once before?

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1 MR. STAMATELATOS: Defendants do not want to settle at
2 this stage, your Honor.

3 THE COURT: They don't? They'd rather going go to
4 trial?

5 MR. STAMATELATOS: Yes, Judge.

6 THE COURT: Let's schedule this for October 11 for a
7 trial. I have another trial the week before that I think
8 should finish up. If it doesn't, or it doesn't look like it, I
9 will let you know. In the meantime then let's have the motion.
10 So, three weeks from today puts us at August 15. And we will
11 just say ten days for you, Mr. Shore?

12 MR. SHORE: Yes, your Honor.

13 THE COURT: So, that's August 25. What day of the
14 week is that? Thursday? All right, I will give you until
15 Friday the 26th just to keep it round. And then September 2nd.
16 Are you around then, Mr. Stamatelatos, September 2?

17 MR. STAMATELATOS: Yes.

18 THE COURT: So, September 2 for the reply brief. That
19 gives me time to look at it and then still be ready for our
20 trial on October 11.

21 All right. What hung this up for settlement was the
22 insistence that it be a confidential settlement, is that
23 correct? That's what it was?

24 MR. STAMATELATOS: That's what Mr. Shore wanted. The
25 defendant's feel was that he doesn't want to settle and then

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1 have a whole bunch of lawsuits by other plaintiffs seeing that
2 he admitted that there were some violations.

3 THE COURT: I don't think he would have to admit there
4 was violations. That wouldn't be a part of the settlement.
5 But, you know the fact of a settlement is something that will
6 be known presumably, and that would be something that might
7 have an impact on others. Who knows. I don't know.

8 It seems to me that there is only so many things in a
9 restaurant that could be the basis for a suit under the ADA,
10 and, you know, if those are repaired, then I think that
11 resolves the problem, but I don't know. But your client sounds
12 like they have moved past that, that they don't want to settle
13 now at all. Right?

14 MR. STAMATELATOS: That's what it seems, your Honor.

15 THE COURT: I am not sure what accounts for that, or
16 it's just that the litigation has become --

17 MR. STAMATELATOS: Actually I spoke to my client
18 actually after the depositions when I think me and Mr. Shore
19 briefly spoke about a possible settlement again. My client
20 said they are were not prepared to settle. I haven't spoken to
21 them since, your Honor.

22 THE COURT: Well, I just don't know if it's worth
23 taking a crack at this before you spend a lot of time writing
24 motions and preparing for trial, and I spend a lot of time
25 resolving motions and preparing for trial. So, that's the

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1 thought. I don't know if you want to do that or if you want to
2 --

3 MR. STAMATELATOS: If your Honor thinks that it might
4 serve a purpose, I have no problem setting it down for a
5 settlement.

6 THE COURT: Well, it's just an odd reason for a case
7 not to settle, it seems to me. But, Mr. Shore, it was your
8 client who was insisting on the confidential treatment of this?

9 MR. SHORE: Your Honor, it wasn't so much the
10 confidentiality; it was the defendant's insistence that the
11 on-the-record admission by plaintiff that it's not really
12 achievable to make certain modifications that the defendant did
13 not want to make, and at that stage of litigation there wasn't
14 enough evidence or discovery -- there was actually no
15 discovery for plaintiff to state that it wasn't readily
16 achievable for certain modifications to be made to the
17 facility.

18 THE COURT: All right. Well, now we have had some
19 discovery, so how does that play into a potential resolution?

20 MR. SHORE: The plaintiff is willing to engage in
21 settlement negotiations and is certainly willing to do so. It
22 is willing to discuss settlement with defense counsel and his
23 clients.

24 THE COURT: Have you told that to Mr. Stamatelatos?

25 MR. SHORE: Yes, I have.

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1 THE COURT: Mr. Stamatelatos, have you discussed that
2 with your client?

3 MR. STAMATELATOS: The last time we discussed it, your
4 Honor, was after the deposition, which I believe was June 30.

5 THE COURT: It sounds like, you know, feelings have
6 been running high since then, but, you know, the alternative is
7 more money and more time and a trial that's going to last how
8 long? What do you think? Not a week. Do you think we will go
9 more than a week?

10 MR. STAMATELATOS: No, Judge, not more than a few
11 days, I don't believe.

12 THE COURT: But still it's time not running a
13 restaurant. I mean I don't know. It seems to me if the
14 parties disagree because one thinks there is a valid cause of
15 action and the other thinks not, that there is a valid defense,
16 then you go to trial. But if it's just that you were close to
17 settling but couldn't because for whatever reason, other
18 factors that have nothing to do with liability, it seems to me
19 silly to get hung up on that. But what do I know.

20 So, I think it's worth obviously conveying that to
21 your client and seeing if there is any reason why it might make
22 sense to get together.

23 The magistrate judge, who was it in this case? Judge
24 Peck. You met with Judge Peck?

25 MR. STAMATELATOS: Yes, Magistrate Judge Peck, your

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1 Honor.

2 THE COURT: So, is it worth spending another couple
3 hours with Judge Peck?

4 MR. STAMATELATOS: I don't mind. We can give it one
5 last shot, your Honor. No problem with that.

6 MR. SHORE: I am willing also.

7 THE COURT: All right. Well, I'm not sure what his
8 schedule is like, but it probably makes sense doing that before
9 you spend a ton of time on briefs, which would be relatively
10 soon, unless you want me to delay the briefing schedule by a
11 week, but that just gets you closer to the trial.

12 What do you think, Mr. Stamatelatos? You have the
13 opening brief, so I will defer to you.

14 MR. STAMATELATOS: We can schedule it for one last
15 try, your Honor.

16 THE COURT: OK. But keep the schedule that I've just
17 set?

18 MR. STAMATELATOS: Maybe if we can push it back a
19 week.

20 THE COURT: All right.

21 MR. STAMATELATOS: That will be fine.

22 THE COURT: All right. So, we will do that. Why
23 don't you let me know before then if you've resolved this. If
24 not, let me know if you haven't and you will move forward with
25 the motions. So, if you can let me know by August 15 whether

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1 you have wrapped up a settlement. If you have, then let me
2 know. If you haven't, just then let me know by the way we are
3 going to keep this schedule and we are going to submit the
4 briefs. OK?

5 August 22, September 2, and then September 9, with
6 trial to start on the 11th of October. And I will issue an
7 order that gives you more information and more detail about
8 pretrial submissions. OK. But I will do that after I have
9 gotten your letter on August 15. OK?

10 MR. STAMATELATOS: Yes, your Honor.

11 THE COURT: All right. We will give it a shot.
12 Anything else we should cover today?

13 MR. STAMATELATOS: No.

14 MR. SHORE: No, your Honor.

15 THE COURT: All right. So, let's see where we are in
16 a few weeks time, and then if it doesn't work out then we will
17 go to trial. Good. OK, thank you, gentlemen.

18 MR. STAMATELATOS: So, we will be in touch with
19 Magistrate Judge Peck.

20 THE COURT: Yes, reach out to him right away. I will
21 refer to him again just for a follow-up. Good. Thank you.
22 Have a good day. If you need a copy of the transcript, you can
23 take that up with the court reporter.

24 - - -
25